SUPREME COURT, U.S.
FILED
MAR 1 - 2011

182 (3)

No. 10-590

IN THE

Supreme Court of the United States

CLACY WATSON HERRERA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

BARRY LEVENSTAM,
Counsel of Record
GABRIEL A. FUENTES
KATHERINE N. WELSH
JENNER & BLOCK LLP
353 N. Clark St.
Chicago, Illinois 60654
(312) 222-9350
blevenstam@jenner.com

March 1, 2011 *Attorneys for Petitioner*

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. The Government's Response Illustrates Why This Court Should Confine The Use Of Mandamus Within The Limits Imposed By Congress In Criminal Trials 1

II. The Government Has Misapprehended The Record In A Manner That Suggests Incorrectly That The Evidence Ruling By The Experienced Trial Judge Here Is Too "Fact-Bound" To Warrant This Court's Review. 4

III. This Court Should Grant Certiorari Now To Address The Seventh Circuit's Unprecedented and Unwarranted *Sua Sponte* Removal Of The Trial Judge Without Briefing From The Parties And Without The Petitioner's Consent. 6

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

Boumediene v. Bush, 553 U.S. 723 (2008) 8

In re United States, 572 F.3d 301 (7th Cir. 2009) 8

Mallard v. United States Dist. Court for the S. Dist. of Iowa, 490 U.S. 296 (1989) 3

Marshall v. United States, 360 U.S. 310 (1959) ... 11

Miller v. French, 530 U.S. 327 (2000) 3

People v. Thompson, 90 N.Y.2d 615, 687 N.E.2d 1304 (N.Y. 1997) 10

Simons v. United States, 119 F.3d 539 (9th Cir. 1941) 10

State v. Boyd, 27 Kan. App. 2d 956, 9 P.3d 1273 (Kan. App. 2000)..... 10

United States v. Amante, 418 F.3d 220 (2d Cir. 2005) 3

United States v. Vinyard, 539 F.3d 589 (7th Cir. 2008) 3

United States v. Wexler, 31 F.3d 117 (3d Cir. 1994) 3

Will v. United States, 389 U.S. 90 (1967)..... 1, 2, 3

Other Authorities

Paul Marcus, *White Collar Crime: A Legal Overview*, 52 U. Cin. L. Rev. 378, 379 (1983) 5

James F. Holderman, *Essays on the Honorable Paul R. Michel*, 10 J. Marshall Rev. Intell. Prop. L. 277 (Winter 2010-2011) 5

Statutory Provisions and Rules

18 U.S.C. § 3731 ..... 1, 2, 4

Federal Rule of Criminal Procedure 25 10

Seventh Circuit Rule 36 9

ARGUMENT

I. The Government's Response Illustrates Why This Court Should Confine The Use Of Mandamus Within The Limits Imposed By Congress In Criminal Trials.

The Seventh Circuit's use of the extraordinary writ of mandamus to overrule a federal trial judge's evidence ruling during the trial itself is unprecedented and in clear derogation of the Criminal Appeals Act and this Court's analysis in *Will v. United States*, 389 U.S. 90 (1967). This Court ought to review the government's proposed expanded availability of the writ in criminal cases, and it ought to confine the writ so as not to permit a judicially created exception that swallows the rule in the Criminal Appeals Act whenever the government believes the excluded evidence is "highly probative," and the district court has committed an "abuse of discretion." The government's brief in opposition ("Opp. Br.") to Petitioner's Petition for Writ of Certiorari ("Pet.") underscores why this Court's review is appropriate now on the questions presented in the Petition.

First, the government seeks to minimize the import of the Congressional directive by characterizing it as "permit[ting] the government to take an interlocutory appeal of only certain enumerated district court rulings." Opp. Br. at 18. But Section 3731 is explicit in limiting the government's right of interlocutory appeal from criminal evidence rulings to those "not made after

defendant has been put in jeopardy and before the verdict." 18 U.S.C. § 3731. Mandamus relief in this case operated as a substitute for the appellate relief that Congress specifically withheld, and the government's position provides no discernible limits on when the government may seek, and the appellate court grant, an interlocutory appeal in the clothing of a writ of mandamus.

Second, the government's brief in opposition also made clear that it would like to let stand the Seventh Circuit's avoidance of the Criminal Appeals Act, and its significant expansion of mandamus to attack mid-trial evidence rulings adverse to the government, on the grounds that excluded evidence was "highly probative" and that the government thus had "no adequate remedy," meaning it could not appeal a ruling that might diminish its chances of securing a conviction. Opp. Br. at 20. But this Court recognized in *Will* that when Congress limited the government's interlocutory appeal rights in criminal cases, it meant what it said. This Court called the government's inability to appeal "irrelevant" and added that "Congress clearly contemplated when it placed drastic limits upon the Government's right of review in criminal cases *that it would be completely unable to secure review of some orders having a substantial effect on its ability to secure criminal convictions*." *Will*, 389 U.S. at 97 n.5 (emphasis added). This Court should review this matter and answer definitively whether the government and the Seventh Circuit have "grant[ed] the Government a

right of review which Congress has chosen to withhold." *Id.*

Third, the government's brief in opposition puts the unprecedented nature of the proposed expansion of the writ of mandamus into sharp focus. None of the cases cited by the government involved a use of mandamus to reverse a mid-trial criminal evidence ruling. In *United States v. Vinyard*, 539 F.3d 589, 591 (7th Cir. 2008), the district court's order had vacated a guilty plea and sentence. In *United States v. Wexler*, 31 F.3d 117, 118-21 (3d Cir. 1994), the mandamus concerned a pre-trial order regarding a jury instruction. In *United States v. Amante*, 418 F.3d 220, 221-22 (2d Cir. 2005), mandamus was sought to challenge an order bifurcating the trial on the day jury selection was to begin. None of those cases supports the use of mandamus to reverse a mid-trial evidence ruling, and none overrides *Will* or Congress's decision to bar mid-trial appeals in criminal cases.

In addition, the government misconstrues the decisions it cites from this Court in support of the proposed expansion of mandamus; neither of those decisions supports the mandamus relief granted here. *See Miller v. French*, 530 U.S. 327, 339 (2000) (casting doubt on whether mandamus would be available to circumvent a statutory limitation on the equitable powers of federal courts under the Prison Litigation Reform Act); *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 308-10 (1989) (approving mandamus where district

court had compelled attorney to represent a client pro bono in a civil matter).

The Seventh Circuit's action in granting mandamus in this case to reverse the district court's evidentiary ruling in the middle of trial is indeed extraordinary and unprecedented, but for reasons that demonstrate the need for this Court's guidance as to the proper limits of mandamus and the viability of Section 3731.

II. The Government Has Misapprehended The Record In A Manner That Suggests Incorrectly That The Evidence Ruling By The Experienced Trial Judge Here Is Too "Fact-Bound" To Warrant This Court's Review.

In the Seventh Circuit and in this Court, the government has misconstrued the record to suggest that the experienced trial judge in this matter ruled "inexplicably" out of "unreasonable fury" and based on "implausible" theories, and thus that this matter is too "fact-bound" for this Court's review. Opp. Br. at 18-20. Petitioner respectfully disagrees. The district court's ruling turned on the government's inability to introduce admissible evidence, in the form of testimony by a witness with personal knowledge, as to how a bag of narcotics grew by 20 grams in weight by sitting on a shelf in the government's evidence storage room. There is no dispute about the weight variance or the fact that the variance caused the district court to exclude the evidence.

The government offered many explanations but none to the jury and none in the form of a witness who could tell the jury how the exhibit grew in weight. The witness identified by the government could not be produced because, although she had earlier testified at the trial, she had left on a camping trip in a remote area of the Colorado Rocky Mountains. The government's heavy reliance on the district judge's comments about planted evidence is unfortunate because the record plainly shows the district court based its ruling only on the departure of the government's chain-of-custody evidence from the presumption of regularity that ordinarily applies to chain-of-custody evidence but that the court found reason to doubt here. *See* Pet. App. 26a-28a. Similarly, the government and the Seventh Circuit excerpted the district court's harshest comments toward the prosecution, when, in full context, the entire colloquy shows that the district court – who is an experienced federal trial judge, chief judge of the Northern District of Illinois, and a distinguished former federal prosecutor and private practitioner[1] – attempted to assist the government by suggesting means of laying the necessary foundation and justifiably found the government's response frustrating (it had released the necessary witness to

---

[1] *See* Paul Marcus, *White Collar Crime: A Legal Overview*, 52 U. Cin. L. Rev. 378, 379 (1983); James F. Holderman, *Essays on the Honorable Paul R. Michel*, 10 J. Marshall Rev. Intell. Prop. L. 277 (Winter 2010-2011).

a remote vacation without soliciting the necessary foundational testimony).

In the end, the government prosecutor admitted on the record that he did not know how the exhibit grew in weight, and the government failed to produce the one witness who it said did have personal knowledge. Consequently, this matter presents important legal issues unaffected by factual details or questions.

III. This Court Should Grant Certiorari Now To Address The Seventh Circuit's Unprecedented and Unwarranted *Sua Sponte* Removal Of The Trial Judge Without Briefing From The Parties And Without The Petitioner's Consent.

As the government concedes, no federal court has "definitively" addressed the extraordinary circumstance of an appeals court's *sua sponte* removal of a criminal defendant's trial judge while the jury was still hearing or set to hear evidence, and without the defendant's consent. Opp. Br. 10. That issue is ripe for resolution now by this Court.

Preliminarily, the government's opposition brief argues that Petitioner failed to raise before the Seventh Circuit his constitutional challenge to the removal and substitution of the trial judge in the middle of trial, *id.* at 11, but that argument highlights the manner in which the Seventh Circuit departed from the accepted and usual course of judicial proceedings. In short, the Seventh Circuit gave the parties virtually no opportunity to file briefs

or make arguments on the question of the judge's removal, which arose *for the first time* when the Seventh Circuit *sua sponte* ordered the judge removed and ordered trial to resume "as soon as possible." Pet. App. at 22a. Neither party had requested such relief. The court entered that order on the docket late on the afternoon of July 27, 2010, prompting the Petitioner to file a rehearing petition, as the Seventh Circuit noted, "seemingly within minutes," Pet. App. at 5a, with a filing shortly before the clerk's office closed, and to supplement the petition with an amended rehearing petition the following morning in an attempt to address the Seventh Circuit's mandamus order as well as the unexpected and unprecedented removal of the trial judge.

In the hastily filed amended rehearing petition, Petitioner called the Seventh Circuit's attention to the "[t]roubling practical and procedural issues" stemming from its *sua sponte* removal of the trial judge and challenged "the entire notion that a new district court could even conduct or resume a trial on such short notice, having no background or experience with the case or the two weeks of trial that went before." Petitioner asked the Seventh Circuit to allow rehearing, whereupon it could give more thorough consideration to those questions, including "the issues of jury competence and effects on the jury." Petitioner thus adequately raised his constitutional challenge. Even if the Court were to conclude that he did not, this Court may review that question under the doctrine of exceptional

circumstances. *See Boumediene v. Bush*, 553 U.S. 723, 772-73 (2008).

The undisputed fact that the government did not request recusal demonstrates the error of the Seventh Circuit's statement that "no reasonable person" would fail to perceive a significant risk that the judge's rulings "might be influenced" by his "unreasonable fury" toward the prosecutors. *See* Pet. App. 12a. The government's inaction suggests that it did not perceive that risk to be sufficient to trigger a recusal motion, despite recent authority in the circuit supporting recusal generally upon a showing of the judge's purported bias. *See In re United States*, 572 F.3d 301, 308 (7th Cir. 2009).

The Seventh Circuit also acted in admitted haste, as demonstrated by its statement that it simply had no time to order a response from the Petitioner. Pet. App. at 6a. The Seventh Circuit then accused the district court of dragging its feet in carrying out the substitution by not designating the replacement judge until the afternoon of July 29 – yet Petitioner's rehearing petition had not even been decided by Seventh Circuit, which released its published opinion on July 30. *See* Pet. App. 2a-3a. In this unusual environment of abbreviated briefing and hasty judicial consideration, which represented a serious departure from the accepted and usual course of judicial proceedings, this Court's review is appropriate now.

The government's claim that certiorari should not be granted now because the Seventh Circuit's

decision is "interlocutory," Opp. Br. 9-10, also ignores the extraordinary nature of the Seventh Circuit's forced recusal order. Modern federal courts have not definitively addressed the due process implications of removing a trial judge while the jury is hearing evidence, perhaps because, as far as Petitioner can tell, no modern federal court has even attempted it until now. The Seventh Circuit at first sought to justify its removal of the trial judge under its own Circuit Rule 36, and then abandoned that justification in its July 30, 2010 opinion. On balance, the highly irregular nature of the Seventh Circuit's action justifies Supreme Court review now, as opposed to after yet another review by the same appeals court which already has decided the matter and denied rehearing. Indeed, the Seventh Circuit's operating procedures appear to call for the assignment of this matter to the same panel which granted mandamus and removed the trial judge. *See* United States Court of Appeals for the Seventh Circuit Operating Procedure 6(b) ("Briefs in a subsequent appeal in a case in which the court has heard an earlier appeal will be sent to the panel that heard the prior appeal"). Meanwhile, the district court has stayed Petitioner's sentencing and entry of judgment on the verdict, pending this Court's decision on the instant certiorari petition.

The government's brief in opposition also served to underscore why this Court should review the Seventh Circuit's removal of the trial judge. The authorities relied on by the government for the constitutionality of the trial judge's removal in the

middle of trial, without Petitioner's consent, are all inapposite. The government cites *Simons v. United States*, 119 F.3d 539, 543 (9th Cir. 1941), where the trial judge had suffered a heart attack before closing arguments – and thus after the jury had heard the evidence. In *State v. Boyd*, 27 Kan. App. 2d 956, 962-63, 9 P.3d 1273, 1279 (Kan. App. 2000), a state appellate court in Kansas approved mid-trial judicial substitution of the initial trial judge, and then the initial trial judge's return in substitution of the second trial judge, based on a state equivalent to Federal Rule of Criminal Procedure 25's requirement that the substitute judge familiarize himself or herself with the record, yet in that case neither substituting judge did so. In *People v. Thompson*, 90 N.Y.2d 615, 620, 687 N.E.2d 1304, 1307 (N.Y. 1997), the New York Court of Appeals considered a judicial substitution to which the defendant explicitly declined to object on federal constitutional grounds, so the case is of little precedential value. As for Federal Rule 25, as Petitioner already noted for the Court, the author of the leading treatise on federal criminal practice has said that it does not authorize mid-trial removal of a trial judge without the defendant's consent. *See* Pet. 17-18.

The government's reliance on *Simons*, *Boyd*, and *Thompson* is notable for another reason bearing upon why this Court should grant review. Each of those cases arose from the trial judge becoming ill during the trial. In the instant case, the trial judge did not become ill, but he was removed *sua sponte* by the court of appeals – after he rejected the

government's offers of evidence before the eyes of a jury which was not finished hearing the evidence and then took more evidence and deliberated to verdict after a substitute judge was installed. The government gives short shrift to this very substantial injection of prejudice and risk of prejudice into the trial by noting that jurors are presumed to follow their instructions. Opp. Br. 15. This Court, however, has exercised its supervisory power when external prejudices threatened to infect jurors even amid standard measures taken to inoculate them. In *Marshall v. United States*, 360 U.S. 310, 312-13 (1959), the Court granted certiorari to consider whether jurors' exposure to newspaper articles prejudiced the trial. Even though all jurors who saw the articles affirmed that they could decide the case fairly and without prejudice from the articles, this Court ordered a new trial. *Id.*

It is impossible to overstate the extent of the prejudice Petitioner suffered by having the jury observe the events that transpired before it. The district court judge ruled against the government in its effort to admit certain evidence. The trial was suspended twice. When the trial finally resumed, the trial judge was replaced and the evidence admitted. These developments focused far too much attention on the evidence, but worse yet, sent the jury a disturbing message concerning the balance of power between the government, which was accusing Petitioner of serious crimes, and the trial judge, who was attempting to ensure the fairness of the proceedings in which he was being tried.

CONCLUSION

This Court should grant Clacy Watson Herrera's Petition for Writ of Certiorari.

Dated: March 1, 2011 Respectfully submitted,

Barry Levenstam,
Counsel of Record
Gabriel A. Fuentes
Katherine Neff Welsh
Jenner & Block LLP
353 N. Clark St.
Chicago, Illinois 60654
(312) 222-9350
blevenstam@jenner.com

Attorneys for Petitioner